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Supreme Court of the United States

OCTOBER TERM, 1942.

No. 493.

EDWARD L. SCHEUFLE, SUPERINTENDENT OF THE
INSURANCE DEPARTMENT OF THE STATE
OF MISSOURI, PETITIONER,

VS.

CENTRAL SURETY AND INSURANCE CORPORATION,
A CORPORATION, AND R. E. O'MALLEY,
RESPONDENTS.

**REPLY BRIEF OF PETITIONER, EDWARD L.
SCHEUFLE.**

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STATEMENT.

In order to answer the contentions raised by the respondents in their separate briefs filed herein, petitioner files this Reply Brief.

It is significant to note that the brief of each of the respondents is devoted practically entirely to technical objections to the form of the presentation of this cause in this Court. The respondents and the Missouri Supreme Court have consistently avoided determination of the Federal questions raised on the merits. Both briefs are devoted to suggestions that the petition be dismissed, not because the statutes clearly do not offend the Constitu-

tion of the United States, but because of some alleged infraction of some procedural rule.

We will undertake to show in this brief that there has been full compliance with the Rules of this Court in the preparation of the petitioner's brief and petition.

I.

The Petition and Brief Comply with the Rules of This Court.

The rules involved in the preparation of a petition for certiorari to state court and supporting brief are Rule 38, Paragraph 2, Rule 12, Paragraph 1, Rules 26 and 27.

The pertinent portion of Rule 38, Paragraph 2, is as follows:

"2. The petition shall contain a summary and short statement of the matter involved; a statement particularly disclosing the basis upon which it is contended that this court has jurisdiction to review the judgment or decree in question (See Rule 12, par. 1); the questions presented; and the reasons relied on for the allowance of the writ. Only the questions specifically brought forward by the petition for writ of certiorari will be considered. A supporting brief may be annexed to the petition or presented separately, but it must be direct and concise (See Rules 26 and 27). A failure to comply with these requirements will be a sufficient reason for denying the petition."

The pertinent portion of Rule 12 is as follows:

"If the appeal is from a state court the statement shall include a statement of the grounds upon which it is contended the questions involved are substantial (*Zacht v. King*, 260 U. S. 174, 176, 177): specify the stage in the proceedings in the court of first instance, and in the appellate court, at which, and the manner in which, the federal questions sought to be reviewed were raised; the method of raising them (*e. g.*, by a pleading, by request to charge and

exceptions, by assignment of error): and the way in which they were passed upon by the court; with such pertinent quotations of specific portions of the record, or summary thereof, with specific reference to the places in the record where the matters appear, (*e. g.*, ruling or exception, portion of the court's charge and exception thereto, assignment of error) as will support the assertion that the rulings of the court were of a nature to bring the case within the statutory provisions believed to confer jurisdiction on this court. The provisions of this paragraph, with appropriate record page references, must be complied with when review of a state court judgment is sought by petition for writ of certiorari" (See Rule 38, par. 2).

The pertinent provisions of Rule 27 are as follows:

"1. The counsel for appellant or petitioner shall file with the clerk, at least three weeks before the case is called for hearing, forty copies of a printed brief.

"2. This brief shall be printed as prescribed in Rule 26 and shall contain in the order here indicated—

"(a) A subject index of the matter in the brief, with page references, and a table of cases (alphabetically arranged), text books, and statutes cited, with references to the pages where they are cited.

"(b) A reference to the official report of the opinions delivered in the courts below, if there were such and they have been reported.

"(c) A concise statement of the grounds on which the jurisdiction of this court is invoked.

"(d) A concise statement of the case containing all that is material to the consideration of the questions presented, with appropriate page references to the printed record, *e. g.* (R. 12).

"(e) A specification of such of the assigned errors as are intended to be urged (See Rule 38, par. 2).

"(f) The argument (preferably preceded by a summary) exhibiting clearly the points of fact and

of law being presented, citing the authorities and statutes relied upon, and quoting the relevant parts of such statutes, federal and state, as are deemed to have an important bearing. If the statutes are long they should be set out in an appendix.

"3. Whenever, in the brief of any party, a reference is made to the record, it must be accompanied by the record page number. When the reference is to a part of the evidence, the page citation must be specific and if the reference is to an exhibit both the page number at which the exhibit appears and at which it was offered in evidence must be indicated."

The petition has complied with every provision of these rules.

On page 5 of its brief the respondent corporation has cited a paragraph of Rule 12 (1) not applicable to petitions for certiorari to a state court, though complied with here.

Pursuant to the election afforded by Rule 38, Paragraph 2, the petitioner filed a brief prepared as outlined in Rule 27. This brief satisfies every requirement of Rule 27.

On page 2 of petitioner's brief, paragraph 1, under the title "Jurisdiction," reference is made distinctly to the section of the Judicial Code of the United States which sustains the jurisdiction in this cause. There it is said:

"1. The jurisdiction of this Court is invoked pursuant to Judicial Code, Sec. 344, as amended by the action of February 13, 1925, 43 Stat. 937; U. S. C. A., Title 29, Sec. 344."

On page 2, paragraph 2, of the petitioner's brief there is set out step by step with appropriate dates and record references, the original judgment sought to be reversed and each procedural step thereafter.

It is untrue as stated on page 31 of the brief of respondent Central Surety and Insurance Company that on the subject " 'the question presented.' The petition and

supporting brief are completely silent * * *” In addition to the very concise statement of the questions presented on page 2 of the petitioner’s brief, the questions presented are reiterated time after time in the petition. These questions are set out specifically in the eighth paragraph of the statement describing the first raising of the questions by motion for rehearing, the questions are again concisely set out in the “Assignments of Error” and in the “Reasons for the Allowance of Writ” contained in the petition for certiorari.

In the Reasons for the Allowance of Writ, in the Assignments of Error, as well as elsewhere, the specific portions of the Constitution of the United States violated, are mentioned and decisions of this Court relied on as illustrating the principles invoked are cited in appropriate places (Petition, pages 5 to 11).

A concise and comprehensive statement of the case showing the questions presented is found in the petition, pages 1 to 6. The questions presented are carefully stated in the petition under the heading Assignments of Error. The questions presented are again stated with citation of authorities under Reasons for Allowance of Writ (pages 9 to 11).

On page 2 of the Petitioner’s brief, paragraph 3, the questions presented are again summarized as follows:

“3. Two questions are raised in this Court. The first question is whether Sections 6052 to 6069, R. S. Missouri, 1939, in respect of the powers granted to the Superintendent of Insurance to deal with the funds in individual accounts of reciprocal insurance subscribers, violate the Fourteenth Amendment to the Constitution of the United States forbidding any state to deprive any person of his property without due process of law. The second and only other question here raised is whether Secs. 6052 to 6069, R. S. Mo., 1939, in respect of the powers granted the Superintendent of Insurance to spend individual trust funds for expenses for which the individual trust funds were not liable under the contract of the subscriber,

are in violation of Section 10, Article I, Clause 1, of the Constitution of the United States, forbidding any state to enact a law impairing the obligation of contract."

(The statutes involved are long and are set out verbatim in the appendix to the Brief under the provisions of Rule 27, paragraph 2 (f).)

When respondents charged that nowhere in the petition or brief were the questions presented set out, respondents apparently had not carefully read the petition and brief.

The cases and specific constitutional provisions thought to sustain the jurisdiction of this Court are cited in the petition on pages 10 and 11 under the "Reasons for Allowance of Writ." This argument is developed in the brief, pages 8 to 11.

The stage of the proceeding at which and manner in which the Federal questions were raised is carefully stated in the eighth paragraph of the statement on page 5 of the petition. In the brief under Point 3 of the argument, pages 12 to 15, it is shown that the Federal questions were timely presented with appropriate references to the authorities on the subject.

Respondent O'Malley urges that it is not disclosed to the Court that the Federal questions were first raised on motion for rehearing. This is clearly revealed by the statement in the petition and by the argument in the brief.

It is stated by the respondent corporation that there is no charge that the Missouri Supreme Court wrongfully refused to pass on the Federal questions. This is not true. On page 6 of the petition, it is stated as a fact that the Supreme Court of Missouri refused to write on the constitutional issues raised in the motion for rehearing. On page 7 of the petition, it is stated that the Missouri Supreme Court erred in refusing to pass upon the point relating to the contract clause of the Federal Con-

stitution. On page 8 of the petition, it is charged that the Missouri Supreme Court erred in refusing to pass upon the point involving the due process clause of the Federal Constitution. This is developed in the brief at page 1, where it is stated in language as respectful as possible that, in refusing to write upon the Federal questions, the Missouri Supreme Court was attempting to avoid determination of the Federal questions.

II.

The Petitioner Has Sufficient Interest to Maintain This Proceeding Because He Is the Statutory Trustee of an Express Trust of Private Interests and Property.

It is suggested by the respondents that the petitioner does not have sufficient interest to challenge the constitutionality of the Missouri Insurance Code. Respondents urge that a state officer with no personal interest is not permitted by law to challenge the constitutionality of a state statute on federal grounds. Not only is the doctrine relied on by respondents inapplicable in this case, but doubt has been cast upon its validity by a decision of this Court in *Coleman v. Miller*, 307 U. S. 433, 83 L. Ed. 1385. However that may be, a prior decision of this Court construing the character of the legal position of the Superintendent of the Insurance Department of Missouri in charge of an insurance company for the purpose of winding up its affairs has definitely settled the right of the Missouri Superintendent to act on behalf of the private individual interest of subscribers, policyholders and creditors. In *Relf v. Rundle*, 103 U. S. 222, this Court held that in such cases the Superintendent of the Insurance Department of Missouri acts as the trustee of an express trust with all the rights which properly belong to such position. In so holding the Court said (103 U. S. 1. c. 225):

"Relf is not an officer of the Missouri state court, but the person designated by law to take the property of any dissolved life insurance corporation of that State, and hold and dispose of it in trust for the use and benefit of creditors, and other parties interested. The law which clothed him with this trust was, in legal effect, part of the charter of the Corporation. He was the statutory successor of the Corporation for the purpose of winding up its affairs. As such he represents the Corporation at all times and places in all matters connected with his trust. He is the trustee of an express trust, with all the rights which properly belong to such a position. He is an officer of the State, and as such represents the State in its sovereignty while performing its public duties connected with the winding up of the affairs of one of its insolvent and dissolved corporations. His authority does not come from the decree of the court, but from the statute. He appeared in Louisiana not by virtue of any appointment from the court, but as the statutory successor of a corporation which the court had in a legitimate way dissolved and put out of existence. He was, in fact, the Corporation itself for all the purposes of winding up its affairs."

The statute construed in the Relf case is Sec. 6058, R. S. Mo., 1939, set out in the appendix to the brief at page 25 is as follows:

"Sec. 6058. Title of assets to vest in Superintendent.

Upon the rendition of a final judgment dissolving a company, or declaring it insolvent, all the assets of such company shall vest in fee simple and absolutely in the superintendent of the insurance department of this state, and his successor or successors in office, who shall hold and dispose of the same for the use and benefit of the creditors and policyholders of such company and such other persons as may be interested in such assets (R. S., 1929, Sec. 5947)."

In addition to that section, Sec. 6059, R. S. Mo., 1939, provides further:

"He (the Superintendent) may also, in his own name as such Superintendent, maintain and defend all actions in the courts of this or any other state, or of the United States, relating to such company, its assets, liabilities, and business."

We do not believe there can be any doubt that the Superintendent on behalf of creditors and subscribers and policyholders, and in his official capacity as statutory trustee therefor, can maintain this proceeding. The Superintendent should be permitted as trustee, to maintain any proceeding and to invoke any provisions of the Federal Constitution that his beneficiaries might maintain or invoke.

III.

Provisions of the Missouri Insurance Code Here Assailed Were Enacted After the Making of the Contracts Involved and Are Not Therefore to Be Con- sidered As Part of Those Contracts.

Both respondents argue inferentially that the contracts of subscribers must be considered as if all statutes were read into them. This may be true as to statutes existing at the time of the adoption and execution of the powers of attorney but contracts executed prior to the adoption of the enactment of the statutes assailed are unconstitutionally impaired by such statutes. *Collidge v. Long*, 282 U. S. 582.

The Association was formed in 1898. There was immaterial modifications from time to time of the power of attorney. The last modification was made in 1933. The Missouri Insurance Code permitting the Superintendent to violate the individual funds of these subscribers without notice of hearing did not become effective until after April 12, 1934 (See Laws of Missouri, 1933-34 Extra Session, pages 71, 178).

This is not an emergency moratorium law such as passed on in *Vier v. Sixth Ward Building and Loan Association*, 310 U. S. 32, cited by Respondent O'Malley.

IV.

The Constitutional Questions Were Timely Raised Under the Missouri Practice.

The existence of a Federal question is to be determined by the Federal decisions rather than the State decisions. *International Harvester Company v. State of Missouri ex inf. Attorney General*, 234 U. S. 199; *Brinkerhoff-Faris Trust and Savings Company v. Hill*, 281 U. S. 673; *Beekman Lumber Company v. Acme Harvester Company*, 215 Mo. 221.

However, respondent urges that the constitutional questions were not timely raised under the Missouri practice. This argument is not correct. The Missouri courts hold that the first opportunity to charge unconstitutionality occurs after the statute involved has been unconstitutionally construed. See *Woodling v. Westport Hotel Operating Company*, 331 Mo. 812, 55 S. W. 2d 477, where it is said, l. c. 479:

“* * * Relying on the general rule that a constitutional question raised for the first time in the motion for a new trial comes too late to give this court jurisdiction when it would not otherwise have jurisdiction, respondents say: ‘The alleged constitutional question upon which the appeal to this court is based was not timely raised,’ and the case should be transferred to the Court of Appeals. Appellants reply that the ruling of the court in its final judgment and decree that appellants did not come into the equitable case within the time required by statute and thereby lost the right to have a lien established and enforced was the first occasion in the course of the case that the provisions of the statute relating to an equitable suit of this kind were invoked and held to operate as a bar to their lien claim, and that the motion for a new trial was therefore the earliest opportunity afforded them to challenge the constitutionality of such statute. Appellants point out that respondents’ demurrers to their intervening petition did not raise any question as to their right under the statute in ques-

tion to have their lien claim enforced in the equitable suit, and that the demurrers were overruled, that respondents did not plead the provisions of the statute relating to the equitable proceeding in bar of appellant's lien claim or the right to maintain and enforce same in that suit, and that the objection made by respondents to the introduction of any testimony on the ground that appellants had not entered the suit within the time prescribed by the provisions of the statute relating to the equitable suit was, by the court, overruled. Thus it appears that there was no occasion or opportunity for appellants to challenge the statute by pleading, and the ruling of the court upon respondents' objection to the introduction of any testimony was adverse to respondents' contention, and did not afford appellants opportunity thereupon to challenge the constitutionality of the statute. 'A constitutional question must be raised timely in the course of orderly procedure. Accordingly, it should be raised in the pleadings if due to be found there; if not, then at the first opportunity, and kept alive. * * * In rare cases * * * it may be raised for the first time in the motion for new trial.' *Miller v. Connor*, 250 Mo. 677, 157 S. W. 81, 83. We are inclined to think that, under the procedure had and the circumstances of this case, appellants' attack upon the constitutionality of the sections of the statute involved was made at the earliest opportunity arising in the course of orderly procedure."

There were no pleadings in this summary proceeding setting up the bar of the statute. Under the Missouri rule any charge before the unconstitutional construction of the statute occurred to the effect that the statute would be unconstitutional if given a certain construction would be insufficient to raise a constitutional question. See *State ex rel. Volker v. Kirby*, 345 Mo. 801, 136 S. W. 2d 319. In this case as in the Woodling case the constitutional issue was first raised immediately following the first adverse judgment construing the statute in the manner charged to be unconstitutional.

Conclusion.

In conclusion your petitioner respectfully submits that the technical objections made by respondents are unfounded; that the serious constitutional questions here raised should be determined by this Court and that its writ of certiorari should issue to that end.

Respectfully submitted,

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